

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



**V**

**City of Somersworth**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid vacation pay, sick pay, floating holiday pay  
and personal day pay  
RSA 275:43 VII unpaid compensatory time  
RSA 275:48 I/II withholding of insurance premium

**Employer:** City of Somersworth, One Government Way, Somersworth NH 03878

**Date of Hearing:** October 26, 2016

**Case No.:** 53372

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant originally asserted, through the filing of his wage claim, that he was owed:

- \$4,699.20 in unpaid vacation pay for 2015 and 2016;
- \$8,159.97 in unpaid sick pay for 2015 and 2016;
- \$626.56 in unpaid floating holiday pay for 2015 and 2016;
- \$313.28 in unpaid personal day pay for 2015;
- \$2,797.79 in unpaid compensatory time; and
- \$2,538.06 for insurance premium he paid out of pocket.

The employer produced a check for the unpaid vacation pay and unpaid compensatory time.

At the hearing, the claimant removed the claim for the unpaid vacation pay, unpaid compensatory time, and the floating holiday from pay for 2016, and chose to continue for the balance of the claim as follows:

- \$8,159.97 in unpaid sick pay for 2015 and 2016;
- \$313.28 in unpaid floating holiday pay for 2015;
- \$313.28 in unpaid personal day pay for 2015; and
- \$2,538.06 for insurance premium he paid out of pocket.

The employer denies the claimant is due any sick pay under the Collective Bargaining Agreement (CBA). Further, personal day pay and floating holiday pay both

have a “use it or lose it” policy in the CBA. The claimant received the health insurance for which he paid premiums out of pocket.

### **FINDINGS OF FACT**

The claimant began working for the employer on May 8, 2006. The employer had suspended the claimant without pay beginning July 13, 2015 and terminated his employment June 28, 2016. He did not return to work between July 13, 2015 and June 28, 2016. He had a final hourly rate of pay of \$19.58.

The claimant and employer continued to operate under a CBA which expired June 30, 2015, but is currently operating under status quo.

The claimant argues he had accumulated 328.75 hours of sick time as of 2015, and had accrued an additional 88.0 hours of sick time in 2016, which the employer failed to pay when he separated from service. The claimant also argues RSA 275:43 V requires an employer to pay out sick time pay as wages.

The employer argues the claimant is not due any sick day pay under the written policy of the employer.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding sick leave pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275:49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer properly notified the claimant, through the CBA, that sick time pay is only payable (50% of the accrued balance) if an employee retires through the New Hampshire Retirement System or in the event of death.

RSA 275:43 V reads, Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, **when due** [emphasis added].

RSA 275:49 III allows an employer to determine their policy as it relates to sick time pay, including if any payment is due at separation. The employer specifically notified the claimant of the circumstances under which sick time pay would become due, and therefore wages. The claimant did not separate from service under criteria for which sick pay would become due and subsequently wages.

As the claimant's separation was not due to retirement through the New Hampshire Retirement system or death, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed sick pay under the written policy of the employer.

The claimant argues he had accumulated 16.0 hours of floating holiday day pay as of July 1, 2015, eight hours of which he had on the books and eight hours of which the employer initially awarded to him and then took it back and 16.0 hours of personal day pay.

The employer argues the claimant is not due any floating holiday day pay or personal day pay under the written "use it or lose it" policy of the employer.

RSA 275:49 III requires that the employer make available to employees in writing, or through a posted notice maintained in an accessible place, employment practices and policies regarding floating holiday day pay or personal day pay. Lab 803.03 (b) requires employers to provide his/her employees with a written or posted detailed description of employment practices and policies as they pertain to paid vacations, holidays, sick leave, bonuses, severance pay, personal days, payment of the employees expenses, pension and all other fringe benefits per RSA 275:49. Lab 803.03 (f) (6) requires an employer maintain on file a signed copy of the notification.

The employer notified the claimant, through section 10.2 of the CBA, that floating holiday days are "to be taken within the contract year and scheduled with at least one week advance notice" and section 10.9 that personal day pay "each fiscal year employees will receive two personal days, which must be used in the fiscal year received and at the discretion of the Director of Public Works and Utilities."

RSA 275:43 V reads, Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, **when due** [emphasis added].

RSA 275:49 III allows an employer to determine their policy as it relates to floating holiday pay and personal day pay, including if any payment is due at separation. The employer specifically notified the claimant that floating holiday pay and personal day pay would be lost if not used during the contract year. The CBA did not notice the claimant of any provisions to "take back" awarded days. Further, the policy did not notice the claimant that these hours would be forfeited if he terminated prior to their expiration.

The CBA did not inform the claimant that he would not be paid for earned floating holiday pay and personal day pay at termination. Because the CBA does not specifically inform the claimant that he would forfeit these benefits at termination if prior to their expiration, the Hearing Officer finds that the claimant earned, and is now due, the claimed floating holiday pay and personal day pay.

The claimant alleges he had to pay his insurance premium out of pocket during his suspension which he argues the employer should have paid using the value of his earned benefit time as they had done for other employees.

The employer argues there is no written policy which requires the employer to use earned benefit time to pay insurance premiums for an employee who is on an unpaid suspension. Further, the claimant received the health insurance for which he paid premium.

There are no statutes to require the employer to use earned benefit time for payments of health insurance premiums.

Therefore, the Hearing Officer finds the claimant failed to prove by a preponderance of the evidence he is due the claimed insurance premiums paid.

### **DECISION AND ORDER**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V sick time pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he was due sick time pay, it is hereby ruled that this portion of the Wage Claim is invalid.

As RSA 275:43 V floating holiday pay and personal days' pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant proved by a preponderance of the evidence that he was not paid all floating holiday pay and personal days' pay earned and due, it is hereby ruled that this portion of the Wage Claim is valid in the amount of \$616.56 (\$313.28 + \$313.28).

As this Department finds the claimant failed to prove by a preponderance of the evidence that he was not paid all wages due because the employer illegally required him to pay health insurance premiums out of pocket under RSA 275:48, it is hereby ruled that this portion of the Wage Claim is invalid.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED] in the total of \$616.56 (\$313.28 + \$313.28), less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: November 7, 2016

Original: Claimant  
cc: Employer

MJD/das